

CASE NO. 82-1164

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

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FILED

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ALEXANDER L. STEVAS,
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JOHNNY J. DOTSON and

DANIEL F. BLOCH,

Petitioners—Plaintiffs,

v.

MOUNTAIN MISSION SCHOOL, INC. et al.,

Respondents—Defendants.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

- 1. DOES 42 U.S.C. SECTION 1985 CONFER UPON
FEDERAL COURTS PERSONAL JURISDICTION
IN A FORUM STATE OVER NON-CONSENTING,
NON-RESIDENT DEFENDANTS?**
- 2. DID THE COURT OF APPEALS EXERCISE
THE PROPER EQUAL PROTECTION REVIEW
OF VA. CODE SECTION 63.1-218?**

LIST OF ALL PARTIES

Plaintiffs:

Johnny J. Dotson and Daniel F. Bloch.

Defendants:

The Mountain Mission School Inc., Charles M. Sublett, James Marvin Swiney, Mrs. James Marvin Swiney, Mrs. Charles M. Sublett, Paul M. Platt, Mabel Abbott, Jim Stanley, Minnie Grannert, Dr. Thomas D. McDonald, Dr. J.P. Sutherland, Fred Short, Rev. Clarence Greenleaf, Mrs. Sylvia Raines, Mrs. B.D. Phillips, Bud Degaffrillo, Keary Bob Williams, Donald A. McGlothlin, Nick E. Persin, Pleasant C. Shields, J. Marshall Coleman, Louie L. Wainwright, Rosemary Griscom, Paul H. Coleman, David W. Schwertfager, Donna Jean Gallion, Mrs. Sharon Mullett, Robert Beck, Asa Mellor, Wanda Mellor, Gary Oyler, Ruth Oyler, Charles Robert Lambert, Mrs. Charles Robert Lambert, Griffen Bell, William Webster, Edward C. Sawyer, Birg Sergeant, Willard Osborne, Roger J. Makely, Ottmar G. Gallion, Richard L. Gibson.

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OPINION BELOW

The opinion of the court of appeals is not reported. The text of the opinion is set forth in the RESPONDENTS' APPENDIX, pp. A-1 — A-20.

JURISDICTION

28 U.S.C. Section 1254 confers upon the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari. The judgment in question was entered by the United States Court of Appeals for the Fourth Circuit on October 18, 1982. An order denying a rehearing was entered on November 12, 1982.

STATUTES AND RULES INVOLVED

The complete text of 42 U.S.C. Section 1985, Va. Code Section 63.1-218 and Fed. R. Civ. P. 4(e) and (f), is set forth in the RESPONDENTS' APPENDIX, pp. A-21 — A-24.

STATEMENT OF THE CASE

On June 11, 1979, the Plaintiffs-Petitioners filed a lawsuit in the United States District Court for the Western District of Virginia, at Big Stone Gap. The complaint alleged causes of action grounded primarily on 42 U.S.C. Section 1985, and sought declaratory, injunctive and monetary relief. Named as defendants were the Mountain Mission School, Inc. and forty-two individuals, including officials of the United States, Virginia, Ohio and Florida.

The Defendants-Respondents herein, Paul H. Coleman, former Assistant Director of the Ohio Department of Public Welfare, and David W. Schwertfager, Chief of the Bureau of Services for Families and Children for the Ohio Department of Public Welfare, filed answers alleging numerous defenses, including lack of personal jurisdiction. By memorandum opinion and order dated September 19, 1979, the district court dismissed the complaint on a number of grounds, and the Plaintiffs-Petitioners timely appealed to the United States Court of Appeals for the Fourth Circuit.

On October 18, 1982, the court of appeals affirmed the lower court's judgment in part, and reversed in part and remanded the case for further proceedings consistent with its opinion. (See Res. App., pp. A-1 - A-20). The court of appeals' opinion discussed seven separate issues, but only the opinion's discussion of the constitutionality of Va. Code Section 63.1-218, and the personal jurisdiction over the defendants for purposes of injunctive and compensatory relief is material to the consideration of the questions presented for review.

The court of appeals, in reviewing the constitutionality of Va. Code Section 63.1-218, initially noted that the Plaintiffs-Petitioners had failed to join as party-defendants either the State of Virginia or the state agency responsible for administering the statute. The court went on to adjudge that the distinction drawn by the statute in question did not harm a discrete and insular minority or impinge upon a fundamental interest. (See Res. App., p. A-6). Applying the minimum rationality test, the court of appeals concluded that the constitutional challenge to Va. Code Section 63.1-218 had no merit. (See Res. App., p. A-7).

In the discussion of the plaintiffs' request for injunctive and compensatory relief, the court of appeals divided the forty-one defendants into five groups for the purpose of determining if personal jurisdiction existed. (See Res. App., p. A-8). Defendants-Respondents Coleman and Schwertfager were grouped with the other Ohio and Florida defendants who had filed answers that explicitly alleged a lack of personal jurisdiction. Citing Fed. R. Civ. P. 4(f) and Va Code 8.01-328.1(A)(4), the court of appeals held, under the traditional long-arm statute analysis, that the district court lacked personal jurisdiction over those out-of-state defendants who affirmatively alleged a lack of personal jurisdiction in their answers. (See Res. App., p. A-10).

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

I. THE DECISION BELOW DID NOT RAISE THE FIRST QUESTION PRE- SENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The first Question Presented in the petition (p.i.) is whether 42 U.S.C. Section 1985 permits a federal court to exercise personal jurisdiction over non-consenting out-of-state defendants. In paragraph 10 of the petition's Argument (p. 10) the Plaintiffs-Petitioners argue that the United States Court of Appeals erred in finding that 42 U.S.C. Section 1985 does not permit federal courts to exercise personal jurisdiction over nonconsenting, out-of-state defendants. The Fourth Circuit, however, neither made this finding nor decided that question in this proceeding.

In Part VI of its opinion (Res. App., p. A-7) the Fourth Circuit merely held that the Plaintiffs-Petitioners must establish personal jurisdiction through the procedures set forth in Rule 4 of the Fed. R. Civ. P. The Fourth Circuit further stated that when the defendants are not located within the forum state, a plaintiff can obtain jurisdiction in the manner prescribed by the state in which the district court is located. Based on this traditional analysis of personal jurisdiction, the Fourth Circuit opined that the Virginia long-arm statute did not extend to the nonresident defendants, including Defendants-Respondents Paul Coleman and Schwertfager.

The Fourth Circuit did not reach the question of whether 42 U.S.C. Section 1985 authorizes nationwide service of process. The reason for this is obvious. Rule

4(f) of the Fed. R. Civ. P. (Res. App., p. A-23) provides that unless authorized by a statute of the United States or of the forum state, service of process other than a subpoena is limited to the territorial limits of the state in which the district court is held. The remedial language of 42 U.S.C. Section 1985 (Res. App., p. A-21) does not specifically provide for nationwide service of process. Furthermore, 28 U.S.C. Section 1343,¹ which confers original jurisdiction upon the district courts in Section 1985 actions, deals with jurisdiction of the subject matter, not with personal jurisdiction over the defendants in the litigation. See *Smith v. Ellington*, 348 F.2d 1021 (6th Cir. 1965), *cert. den.*, 382 U.S. 998 (1966); *Safeguard Mutual Insurance Company v. Maxwell*, 53 F.R.D. 116 (E.D. Pa. 1971). Thus, the Fourth Circuit did not address the first Question Presented since 42 U.S.C. Section 1985 does not deal with personal jurisdiction.

II. ABSENT A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WHICH EITHER ADOPTS OR REJECTS A CONSPIRACY THEORY OF PERSONAL JURISDICTION, NO REASONS EXIST FOR A GRANT OF CERTIORARI.

Paragraphs 9-13 of the petition's Argument (pp. 9-10) tacitly admit that the district court lacked personal

1. In paragraph 12 of the petition's Argument (p. 10), the Plaintiffs-Petitioners contend that 42 U.S.C. Section 1985 must be construed to provide nationwide service of process; otherwise, conspiracies committed in Washington D.C. would not fall within Section 1985 since the District of Columbia is not a state. This logic is a *non sequitor* because the District of Columbia is in fact considered a "state" for purposes of 28 U.S.C. Section 1343(b), the jurisdiction statute for 42 U.S.C. Section 1985.

jurisdiction over the nonresident defendants in this case under the traditional long-arm statute analysis. These paragraphs do argue, however, that personal jurisdiction should exist over the out-of-state defendants pursuant to the conspiracy theory of personal jurisdiction.

This theory has been addressed by a scattered number of district courts. *E.g., Socialist Workers Party v. Attorney General*, 375 F.Supp. 318, 321-22 (S.D.N.Y. 1974); *Mandelkorn v. Patrick*, 359 F.Supp. 692, 694-97 (D.D.C. 1973). Several district courts within the jurisdictional territory of the Fourth Circuit have, in fact, adopted the conspiracy theory where the question has arisen. *E.g., Gemini Enterprises, Inc. v. WFMJ Television Corp.*, 470 F.Supp. 559, 564 (M.D.N.C. 1979); *McLaughlin v. Copeland*, 435 F.Supp. 513 (D.Md. 1977). Nevertheless, the conspiracy theory of jurisdiction was not raised by the Plaintiffs-Petitioners in the matter *sub judice* at either the district court level, or the court of appeals level. Furthermore, Plaintiffs-Petitioners do not refer to any reported or unreported decisions of the Court of Appeals for the Fourth Circuit which raise the issue of the conspiracy theory of personal jurisdiction.

There are two reported court of appeals decisions that discuss the conspiracy theory. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981); *Glaros v. Perse*, 628 F.2d 679 (1st Cir. 1980). In *Chrysler Corp.*, the Sixth Circuit neither adopted nor rejected the conspiracy theory of *in personam* jurisdiction. The First Circuit in *Glaros* expressly refused to recognize the theory. Unlike the district courts and the First and Sixth Circuits in the cases above, the Fourth Circuit Court of Appeals has not adopted a position on the issue of the conspiracy theory. Therefore, there does not exist any conflict between the Fourth Circuit and the other courts on that issue so as to create a basis for granting certiorari.

This court should further note that the Plaintiff-Petitioner Bloch, alleging basically the identical wrongdoings, has filed a separate suit in the United States District Court for the Northern District of Ohio, Eastern Division, against many of the same defendants, including Respondent Schwertfager. *Robert Lee Watts, et al. v. Donna Jean Gallion, et al.*, Case No. C81-1139, filed June 1, 1981 (Judge Aldrich). Since personal jurisdiction over the Ohio defendants in the *Watts* case has not, and cannot be challenged in that action, it is clear that the Civil Rights Act is fulfilling its function of providing an adequate remedy for the vindication of the plaintiff's rights.

III. THE ISSUE RAISED IN THE PETITION'S SECOND QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

The second Question Presented in the petition (p.i.) seeks this Court's review of the constitutionality of the provisions of Va. Code Section 63.1-218 (Res. App., p. A-21) which exclude from the state's child care licensure laws any private school or incorporated charitable institution located west of Sandy Ridge and on the watersheds of the Big Sandy river. The Defendants-Respondents submit that the issue of the constitutionality of this statute lacks overall national importance sufficient to warrant a grant of certiorari.

The Fourth Circuit, in its review of the statute, found that it does not harm a discrete and insular minority or impinge on a fundamental interest. Applying the minimum rationality test, the Fourth Circuit held Va.

Code Section 63.1-218 to be constitutional. The court of appeals merely adopted a long-respected doctrine. *Cf. Schweiker v. Wilson*, 450 U.S. 221 (1981). Paragraphs 1-8 of the petition's Argument (pp. 8-9) do not reference any authority that would dispute the correctness of the Fourth Circuit's decision.

These same paragraphs apparently do not accurately or fully set forth the facts surrounding the pertinent Virginia statutes. The Brief In Opposition to Petition For Writ of Certiorari filed by the Defendants-Respondents Mountain Mission School and its officials and employees contends that although Va. Code Section 63.1-218 excludes from licensure the geographical area in which the Mountain Mission School is located, the school still falls within the protective web of the state's child abuse and neglect statutes set forth in Va. Code Chapter 12.1 of Title 63. *See*, Respondent Mountain Mission School's Brief in Opposition, pp. 2-3, 7-8. Yet, on the other hand, the Plaintiffs-Petitioners argue that the residents of the Mountain Mission School are not afforded the same statutory and regulatory safeguards as residents of other similar institutions. This is simply not the case, however, as the clear language of the pertinent Virginia statutes provides for child-protective services for all children in Virginia. *See* text of the statutes found in the Appendix of Respondent Mountain Mission School's Brief in Opposition. Therefore, the Plaintiffs-Petitioners misstated essential facts regarding their equal protection claims.

CONCLUSION

Because of the interlocutory nature of the opinion below, and for the above-stated reasons, this case is not one which requires the exercise of the United States Supreme Court's extraordinary and discretionary review. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been forwarded via the U.S. Mail, first class postage prepaid, this _____ day of February, 1983, to each of the following: Larry H. Spalding, Lewis & Spalding, 6624 Gateway Avenue, Sarasota, Florida 33581; Linwood T. Wells, Jr., Assistant Attorney General, 830 E. Main Street, Room 900, Richmond, VA 23219; E.K. Street, P.O. Drawer S, Grundy, VA 24614; E. Montgomery Tucker, U.S. Attorney, P.O. Box 1709, Roanoke, VA 24008; Birg E. Sergent, P.O. Box 426, Pennington Gap, VA 24277; Mr. and Mrs. Charles R. Lambert, 104 River Road, Ellwood City, PA 16117; Robert P. Beck, 101 S. Washington Street, Millersburg, OH 44654; Roger J. Makley, IBM Building, W. Second Street, Dayton, OH 45401; Edward C. Sawyer, 7000 S.W. 62nd Avenue, Suite B-234, So. Miami, FL 33143; and Martin Friedman, Assistant Attorney General, Capitol Building, Tallahassee, FL 32301.

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COLEMAN AND SCHWERTFAGER**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1771

Johnny J. Dotson and
Daniel F. Bloch,

Appellants,

v.

The Mountain Mission School;
Charles M. Sublett, President;
James Marvin Swiney, Vice-President;
Mrs. James Marvin Swiney, Secretary;
Bernice Sublett, Treasurer; Paul M.
Platt, Teacher; Mabel Abbott, Teacher;
Jim Stanley, Teacher; Minnie Grannert,
Teacher; Dr. Thomas D. McDonald;
Dr. J.P. Sutherland; Fred Short;
Herman T. Wells; Rev. Clarence
Greenleaf; Mrs. Sylvia Raines;
Mrs. B.D. Phillips; Bud Degaffrillo;
Keary Bob Williams; Donald A. McGlothlin;
Nick E. Persin; Pleasant C. Shields;
J. Marshall Coleman; Louie L. Wainwright;
Rosemary Griscom; Paul H. Coleman;
David W. Schwertfager; Donna Jean Gallion;
Mrs. Sharon Mullett; Robert Beck;
Asa Mellor; Wanda Mellor; Gary Oyler;
Ruth Oyler; Charles Robert Lambert;
Mrs. Charles Robert Lambert (Lynda);
Griffin Bell; William Webster;
Edward C. Sawyer; Birg Sergent; Willard
Osborne; Roger J. Makely; Ottmar G.
Gallion; Richard L. Gibson,

Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Big Stone Gap. Glen M. Williams, District Judge.

Submitted December 10, 1981

Decided October 18, 1982

Before WINTER, Chief Judge, BUTZNER and RUSSELL, Circuit Judges.

(Johnny J. Dotson and Daniel F. Bloch, Appellants' Pro Se; E. Montgomery Tucker, Acting U.S. Attorney; Martin Friedman, Attorney General's Office; Linwood T. Wells, Jr., Assistant Attorney General; Robert P. Beck; Birg E. Sergent; E. K. Street, Street, Street & Street, on brief for Appellees.)

UNPUBLISHED

PER CURIAM:

Daniel Bloch, pro se plaintiff, is an individual who has become interested in the activities of The Mountain Mission School, an orphanage located in Western Virginia. He has never been a resident or employee of the orphanage. He believes that children at the orphanage are illegally abused, and that public officials and private individuals have committed illegal acts, some of them harming Bloch, in an effort to cover up the abuses.

Bloch filed the present case in the district court asserting these claims and seeking assorted forms of declaratory, injunctive and monetary relief. The alleged causes of action were primarily grounded on 42 U.S.C. Section 1985. Named as defendants were the orphanage and forty-two individuals, including officials of the United States, Virginia, Ohio and Florida. Named as plaintiffs were Bloch and Johnny J. Dotson, a minor who was then residing with Bloch in Florida, but who had previously resided in the orphanage. Bloch was the only person to sign any of the plaintiffs' pleadings in the district court, but he asserted that he was Dotson's legal guardian and that he was signing on Dotson's behalf as well as for himself.

The district court ultimately dismissed the complaint and related pleadings on a number of grounds, and plaintiffs appeal. While they assign twenty-four grounds of reversible error, we perceive seven separate issues which merit discussion. We will treat them seriatim, setting forth additional facts where required. We affirm the judgment in part, and we reverse in part and remand for further proceedings.

I.

MANDAMUS

Bloch sought a writ of mandamus compelling federal officials to prosecute various defendants. The district court dismissed this portion of the case on the ground that mandamus will not lie to compel the performance of an act unless it is ministerial in nature, which the initiation of prosecution is not. See Record on Appeal at Tab 36, pages 3-4. The dismissal was correct. In any event, in a subsequent pleading, the plaintiffs explicitly abandoned this portion of the case. See *id.* at Tab 38, page 9A.

II.

THE FREEDOM OF INFORMATION ACT

Bloch sought an injunction under the Freedom of Information Act compelling federal officials to turn over certain records to him. The district court dismissed this portion of the case on the ground that "such a suit would be against the United States and should be filed in the jurisdiction in which the plaintiffs reside [*i.e.*, Florida] as set forth in 28 U.S.C. Section 1402." *Id.* at Tab 36, page 4. This reasoning was erroneous. The Freedom of Information Act itself provides that suit to enforce it may be brought "in the district in which the complainant resides, or has his principal place of business, *or in which the agency records are situated.* . . ." 5 U.S.C. Section 552(a) (4) (B) (1976) (emphasis added). The pleadings do not indicate where the agency records at issue are kept. They may well be kept in the Western District of Virginia, where the suit was filed. In a subsequent pleading, however, the plaintiffs also explicitly abandoned this portion of the case, *see* Record on Appeal at Tab 38, page 9, so that any error on the part of the district court was immaterial.

III.

HABEAS CORPUS

On May 29, 1975, in a state court located in the Western District of Virginia, Bloch was convicted on two counts of abduction. Bloch was charged with taking two wards of The Mountain Mission School to Florida without obtaining the orphanage's permission. As part of the present suit, Bloch sought a writ of habeas corpus over-

turning this conviction. The district court dismissed this portion of the case for failure to exhaust state remedies. Bloch subsequently abandoned this portion of the case, see Record on Appeal at Tab 38, page 11, so that we need not consider the propriety of the dismissal.

IV.

OHIO ORPHANS

The plaintiffs claim that Ohio welfare officials violated Ohio law by placing Ohio orphans in The Mountain Mission School, an unapproved institution. The district court rejected this claim on two grounds: (1) Ohio welfare officials have removed the Ohio orphans from The Mountain Mission School, thereby mooting the controversy; (2) More importantly, the plaintiffs never had standing to challenge the practice. We agree that plaintiffs lacked standing to raise this issue.

V.

UNCONSTITUTIONALITY

The plaintiffs maintain that Va. Code Section 63.1-218 (1980) is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The statutory provision reads as follows:

None of the provisions of this chapter [regulating orphanages and other child-care institutions] shall apply to any private school or charitable institution incorporated under the laws of this State, which is located west of Sandy Ridge and on the watersheds of Big Sandy River, and to which no contributions are made by the State or any agency thereof.

The Mountain Mission School may well be the only child-care institution thereby exempted from regulation. The district court never mentioned this claim, although it dismissed the entire case.

As a preliminary matter, we think that the plaintiffs have failed to join a proper defendant for this portion of the case. A suit challenging the constitutionality of this statutory provision should be brought against the state, the state agency that would regulate The Mountain Mission School but for the exemption, or the state official in charge of that agency. None of these are defendants in the present case.

In any event, we think that the statute is constitutional. We do not perceive that the distinction drawn by the Virginia legislature harms a discrete and insular minority or impinges on a fundamental interest. (Even if orphans are a discrete and insular minority, heightened scrutiny would not be appropriate because this statute draws a distinction between two different groups of orphans, rather than between orphans and non-orphans.) Therefore, the applicable test is the minimum rationality test. Only one time in the last half century has the Supreme Court struck down a statute under this test, *see* *Morey v. Doud*, 354 U.S. 457 (1957) (striking down a law that exempted the American Express Company by name from regulations imposed on sellers of money orders),¹ and recently that decision was explicitly

1. The Burger Court ostensibly has applied this test on a number of occasions to strike down statutes, but these decisions are generally interpreted as implicit extensions of heightened scrutiny to new subjects (e.g., gender-based distinctions). *See, e.g.,* G. Gunther, *Cases and Materials on Constitutional Law*, 663 nn. 13, 15 (9th ed. 1975).

overruled, *see* *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (per curiam opinion representing the views of seven Justices) (upholding a grandfather clause that exempted two vendors from a ban on pushcarts in the French Quarter). In the majority of cases of this sort, the Court has not found it necessary to write an opinion, but instead has rejected the challenge summarily. *See* G. Gunther, *Cases and Materials on Constitutional Law*, 674 n.1 (9th ed. 1975). Moreover, we are unaware of any other case where a claim of this sort was brought by a "customer" of an unregulated entity, seeking an extension of the regulation. Rather, claims of this sort have been brought by regulated entities, and the remedy, if any, was thought to be invalidation of the regulation. We conclude that there is no merit to this portion of the plaintiff's case.

VI.

INJUNCTIVE AND COMPENSATORY RELIEF FOR OTHER INJURIES

Having decided the five more narrow portions of this case, we are left with an open-ended request for injunctive and compensatory relief for other injuries.

A. Jurisdiction

At the outset, it is appropriate to determine which of the many defendants are properly before us and which should be dismissed for lack of personal jurisdiction. The plaintiffs' abandonment of the mandamus and Freedom of Information Act portions of their case, earlier mentioned, took the form of an abandonment of all claims against defendants William Webster and Griffin Bell. That leaves forty-one defendants, including The Moun-

tain Mission School. These forty-one defendants may be divided into five groups for the purpose of determining if personal jurisdiction exists:

- (1) *The Virginia Defendants* — The Mountain Mission School, sixteen of its officers, directors and employees, and eight other individuals (Williams, McGlothlin, Persin, Shields, J. Marshall Coleman, Sergeant, Osborne, and Gibson) fall into this group.
- (2) *Makely* — This defendant is a United States Magistrate in Ohio. There is no indication in the record that he was ever served. He has filed no pleadings in the case.
- (3) *Sawyer* — This defendant is a private attorney in Florida. He filed an answer and a motion to dismiss but failed to allege a lack of personal jurisdiction.
- (4) *Other Ohio and Florida Defendants* — Twelve individuals (Wainwright, Griscom, Paul Coleman, Schwertfager, Donna Gallion, Mullett, Beck, Asa Mellor, Wanda Mellor, Gary Oyler, Ruth Oyler, and Ottmar Gallion) fall into this group. They filed answers that explicitly alleged a lack of personal jurisdiction.
- (5) *Pennsylvania Defendants* — Two individuals (Charles Lambert and Lynda Lambert) fall into this group. They filed a pro se "motion to dismiss" which failed to allege a lack of personal jurisdiction.

Unless an exception is provided by federal law or the law of the forum state, a federal court may exercise personal jurisdiction over a nonconsenting defendant only if he is served within the boundaries of the forum state. See Fed. R. Civ. P. 4(f). Federal law does not create any exceptions that are even conceivably applicable to the nonresident defendants in this case. See generally 4 C. Wright & A. Miller, *Federal Practice and Procedure* Sections 1118, 1125, at 523 n.3 (1969 & 1981 pocket part). Virginia state law creates only one exception that is even conceivably applicable to the nonresident defendants in this case: the subsection of the Virginia long-arm statute which covers a defendant "[c]ausing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State," Va. Code Section 8.01-328.1 (A) (4) (1981 Cum. Supp.) (emphasis added). It does not appear that a Virginia court has ever construed the emphasized language, but we do not think that it extends to any of the nonresident defendants in this case. Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that it was unconstitutional for Oklahoma to apply a similar long-arm statute to an East Coast auto distributor and an East Coast auto retailer, even though an East Coast customer drove his auto to Oklahoma; was involved in an accident there, and allegedly was injured as a result of a defect in the auto).

Of course, a federal court may exercise jurisdiction over a nonresident defendant who consents thereto by failing to allege a lack of personal jurisdiction in his answer or in his first motion, whichever comes first. See Fed. R. Civ. P. 12(h)(1). It is clear that Sawyer and the Pennsylvania defendants consented in this manner to the exercise

of personal jurisdiction over them. Makely's status is unclear. Some courts have held that a defendant who fails to respond to a complaint in a timely fashion does not thereby consent to the exercise of personal jurisdiction over him, *see* cases cited in 5 C. Wright & A. Miller, *Federal Practice and Procedure* Section 1391, at 857 n.44 (1969), but the better view is that, *if the defendant was served*, his failure to respond in a timely fashion constitutes consent, *see id.* Section 1391, at 857-58. Therefore, the question of whether the district court has personal jurisdiction over Makely depends on whether he was served, which is something that is not reflected in the present record.

We conclude that only the defendants in the fourth group should be dismissed for lack of personal jurisdiction at this time. On remand the district court should determine whether Makely was served.

B. The Merits.

The request for injunctive and compensatory relief is grounded upon 42 U.S.C. Section 1985. Section 1985 (1) prohibits conspiracies to prevent federal officials "by force, intimidation, or threat" from discharging their duties. The first half of Section 1985(2) prohibits conspiracies to prevent persons from attending or testifying in federal court. The second half of Section 1985(2) prohibits conspiracies to obstruct justice in state court "with intent to deny to any citizen the equal protection of the laws." Finally, Section 1985(3) prohibits conspiracies to deprive any person "of the equal protection of the laws, or of equal privileges and immunities under the laws."

The factual allegations in the complaint do *not* implicate Section 1981(1) and *do* implicate the second half of Section 1985(2) and Section 1985(3). As for the first half of Section 1985(2), the complaint accuses defendant Persin of threatening Bloch in order to prevent him from testifying in a civil suit, but fails to indicate in what court that civil suit was to have been filed. *See* Record in Appeal at Tab 1, page 2. The complaint also accuses assorted individuals of agreeing to dismiss a federal suit brought by Ohio Welfare officials against The Mountain Mission School in order to prevent orphans, presumably including plaintiff Dotson, from giving damaging testimony. *See id.* at Tab 1, page 3.² Also, an inference can reasonably be drawn from the complaint as a whole that one purpose of the illegal conduct in which the defendants allegedly engaged was generally to prevent the filing of a federal suit or the testimony of the plaintiffs therein.

Given that pro se pleadings must be read liberally, we think that the plaintiffs must be afforded the opportunity to develop a claim under both halves of Section 1985(2) and under Section 1985(3) on remand in the district court if the other prerequisites for a suit under these provisions are present.

The district court gave five reasons for dismissing some or all of this portion of the case as against some or all of the defendants:

2. Admittedly, this allegation is improbable, since some of the same individuals filed the suit in the first place.

(1) Class-based animus was a prerequisite and was not present;³

(2) The statute of limitations had expired for Bloch's claims;⁴

(3) Defendant Persin enjoyed judicial immunity;

(4) The defendant Florida parole officials did nothing wrong because they had a right to supervise the conduct of parolee Bloch;

(5) The complaint did not even allege that the directors of The Mountain Mission School or sixteen other individual defendants did anything wrong.

We turn to these reasons.

While courts have disagreed on whether class-based animus is an essential element for a violation of the first half of Section 1985(2), *see* cases cited in *Kimble v. D.J. McDuffy, Inc.*, 70 L.Ed.2d 651 (1981) (White, J., dissenting from a denial of certiorari), they agree that it is an essential element for a violation of the second half of Section 1985(2), *see, e.g., McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980) (holding that it is not an essential element for a violation of the first half of Section 1985(2) but that it is an essential element for a violation of the second half of Section 1985(2)), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830

3. Originally, the district court also held that state action was a prerequisite and was not present for many of the defendants. In a motion for reconsideration, the plaintiffs pointed out that state action is not a prerequisite for a suit under Section 1985. The district court modified its order accordingly.

4. Originally, the district court also held that the statute of limitations had expired for Dotson's claims. In a motion for reconsideration, the plaintiffs pointed out that Dotson had been a minor until after the suit was filed, so that the limitations period had never started to run on his claims. The district court modified its order accordingly.

(3 Cir. 1976) (same), and the Supreme Court has held that it is an essential element for a violation of Section 1985(3), *see* *Griffin v. Breckenridge*, 403 U.S. 88 (1971). We find persuasive those decisions holding that class-based animus is *not* a prerequisite for a violation of the first half of Section 1985(2) but that it *is* a prerequisite for a violation of the second half of Section 1985(2). The "equality" language that is the foundation for the class-based animus requirement in Section 1985(3) is conspicuously absent from the first half of Section 1985(2) but is present in the second half of Section 1985(2).

The complaint clearly alleges that the conspiracy was motivated in part by animus against orphans, and we think that that is enough to invoke the portions of Section 1985 that require class-based animus. In *Griffin*, the Supreme Court dealt with a conspiracy motivated by racial bias--the core concern of Section 1985--but stated in a footnote: "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of Section 1985(3) before us." 403 U.S. at 102 n.9. At that point, the *Griffin* court cited the remarks of Senator Edmunds, the Senate manager of the Ku Klux Klan Act of 1871, which enacted Section 1985. Senator Edmunds opined that the statute would cover Democrats, Catholics or Methodists. *See* Cong. Globe, 42d Cong., 1st Sess. 567 (1871). We have recently relied in part on those remarks in holding that Section 1985(3) covered a conspiracy motivated in part by animus against members of the Unification Church (*i.e.*, "Moonies"). *See* *Ward v. Connor*, 657 F.2d 45 (4 Cir. 1981), *cert. denied sub nom.* *Mandelkorn v. Ward*, 50 U.S.L.W. 3570 (Jan. 18, 1982).

Since *Griffin*, the Supreme Court has not faced the question of what classes are protected by the portions of Section 1985 that require class-based animus, and the decisions of the lower courts are impossible to reconcile, *see* cases cited in *Scott v. Moore*, 640 F.2d 708, 718-24 (5 Cir. 1981). We think, however, that orphans are far more analogous to members of racial minorities than are members of a political party, whom Senator Edmunds would have included, or members of other groups that have been included by the courts, *see, e.g., Scott v. Moore, supra* (nonunion workers).

It is not enough, however, to conclude that Section 1985 was meant to cover the conspiracy alleged in this case. It must also be true that Congress had the power to prohibit such a conspiracy. *See Griffin v. Brackenridge, supra; Ward v. Connor, supra; Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4 Cir. 1974). In *Griffin*, the Supreme Court held that Congress had the power to reach a private conspiracy motivated by racial bias against blacks under the Thirteenth Amendment, which is phrased as a positive command rather than as a limitation on government and thus involves no state action requirement. The Court also stated that Congress had the power to reach the conspiracy because one of its objects had been to interfere with the plaintiffs' right to travel, which is guaranteed--like the right to be free from slavery--by a positive (albeit implicit) command, rather than by a limitation on government. The Court explicitly declined to decide whether Congress had the power to reach private conspiracies under the Enforcement Clause of the Fourteenth Amendment, the other clauses of which limit only the states.

In *Bellamy*, we dealt with a private conspiracy motivated by animus toward the Ku Klux Klan (an ironic development given the origin of Section 1985).

Neither the Thirteenth Amendment nor the right to travel was implicated, and we avoided the question of congressional *power* by interpreting Section 1985 not to reach private conspiracies unless they implicated one of the sources of power relied on by the *Griffin* Court. Finally, in *Ward*, we held that Congress had the power to reach a private conspiracy to "deprogram" a "Moonie" because one object of the conspiracy had been to interfere with the plaintiff's right to travel. There, we said: "[T]he complaint specifically alleges that interference with the plaintiff's right to travel was one of the objects of the conspiracy and the fact that the conspiracy had other objectives is immaterial." 657 F.2d at 48. The complaint in the present case contains numerous allegations that interference with the plaintiffs' right to travel was one of the objects of the conspiracy, so *Ward* compels the conclusion that Congress had the *power* to reach the conspiracy alleged in this case.

Another possible problem arises at this point. Plaintiff Dotson is a member of the protected class, but plaintiff Bloch is not. By its terms, the portions of Section 1985 that require class-based animus do not require that the plaintiff be a member of the protected class, but only that the plaintiff be harmed as a result of a conspiracy motivated in part by animus toward a protected group. We think that the statute should be accorded its literal meaning. The Supreme Court has expressly adopted this broad rule of standing under a related statute, see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (applying 42 U.S.C. Section 1982), and support for doing the same under the portions of Section 1985 that require class-based animus can be found in *Griffin* itself, see *Novotny v. Great American Federal Savings and Loan Assoc.*, 584 F.2d 1235, 1245 (3 Cir. 1978), *rev'd on other grounds*, 442 U.S. 366 (1979) (expressing no

disagreement with the lower court's holding that the plaintiff had standing despite the fact that he was not a member of the protected class). In *Griffin*, the plaintiffs alleged that they were attacked because the conspirators mistakenly thought that one of the plaintiffs' traveling party—who did not join as a plaintiff—was a civil rights worker. The *Griffin* Court held that the plaintiffs had standing, even if the supposed civil rights worker had been the only target of the conspiracy, simply because they were injured as a result of the conspiracy. See 403 U.S. at 103. This holding is not directly applicable in the present case, because the plaintiffs in *Griffin* were members of the protected class, but the holding does seem to indicate that Bloch has standing. We therefore conclude that he does.

The district court ruled that Bloch's claims were barred by the statute of limitations. In a conspiracy case, the limitations period begins to run when the last act is committed in furtherance of the conspiracy. The plaintiffs have at least alleged that such an act occurred within a few months of the filing of the suit. See Record on Appeal at Tab 1, page 4. Upon further development of the facts, it may turn out that a dismissal of Bloch's claims under the statute of limitations would be appropriate, but we think that a dismissal on this ground at this stage was erroneous.

The district court ruled that defendant Persin enjoyed absolute judicial immunity from this suit. If the allegations against Persin, a state judge, are taken to be true—if he informed counsel for residents of The Mountain Mission School who wished to file suit that, if Bloch testified in that proceeding, he would imprison Bloch—we think that this defendant acted in the clear absence of all jurisdiction, so that judicial immunity would not apply.

See Stump v. Sparkman, 435 U.S. 349 (1978). We think the district court was in error in dismissing the claims against Persin on this ground.

Because the Florida welfare officials must be dismissed for lack of personal jurisdiction, we do not consider the correctness of the district court's ruling that the defendant Florida welfare officials did nothing wrong because they had a right to supervise the conduct of parolee Bloch.

Finally, it is true that the text of the complaint fails even to mention many of the named defendants. There are many serious allegations, however, in which the actor is not named. Since pro se complaints must be read liberally, we think that it was premature to dismiss defendants on this basis at this stage of the proceedings. A number of the defendants objected to the vagueness of the complaint and demanded strict proof. Instead of outright dismissal, the plaintiffs should be required to clarify their allegations. When this has been done, a number of summary dismissals may well be appropriate.

VII.

BLOCH'S LEGAL CAPACITY TO SUE FOR DOTSON

In the district court, The Mountain Mission School, all sixteen of its officers, directors and employees, Williams and Osborne asserted that Dotson's claims against them were not properly before the court because Dotson had signed none of the plaintiffs' pleadings. Dotson's failure to sign any of the plaintiffs' pleadings would preclude litigation of his claims against these defendants unless Bloch, who did sign all of the pleadings, was an attorney or otherwise had legal capacity to sue on Dotson's behalf. *See Fed. R. Civ. P. 11, 17.* Bloch

is not an attorney. Bloch alleges that he was appointed Dotson's legal guardian by a Florida court, but does not allege that he was appointed Dotson's legal guardian by any Virginia court. We think that we must look to Virginia law to determine whether Bloch has legal capacity to sue on Dotson's behalf in a district court located in Virginia. See 6 C. Wright & A. Miller, *Federal Practice and Procedure* Section 1571, at 780-81 (1971).

In *Holt v. Middlebrook*, 214 F.2d 187 (4 Cir. 1954), we applied Va. Code Section 26-59, which provides that no person not a resident of Virginia shall be appointed or allowed to qualify *or act* as a personal representative, or be appointed as a guardian, unless a resident is appointed as a personal representative or guardian, as the case may be. We held that this statute prohibited a non-resident personal representative from maintaining an action against Virginia residents in a district court located in Virginia unless a resident had also been appointed as a personal representative. However, we later held in *Vroon v. Templin*, 278 F.2d 345 (4 Cir. 1960), that this statute did not prohibit a nonresident guardian from maintaining an action against Virginia residents in a district court in Virginia. It was our view that the right of guardian to sue in a district court in Virginia was governed by the common law of Virginia. We left that question to the district court.

Unfortunately, there is no definitive Virginia decision indicating what the common law of Virginia is with respect to the right of a guardian not appointed by a Virginia court to sue on behalf of his alleged ward. In such circumstances we are obliged to make an informed prediction of how a Virginia court would decide the question if it were presented with it.

The majority rule at common law is that nonresident guardians may not bring suit out of the state of their appointment unless they obtain an ancillary appointment from the state in which they are suing. See 6 C. Wright & A. Miller, *supra*, Section 1565, at 754-56. Many states with the majority common-law rule have relaxed it by legislation permitting foreign fiduciaries to sue locally. See *id.* Virginia has such a statute but it is very limited in scope. Va. Code Section 26-60 permits a guardian who has been lawfully appointed in the state where a non-resident infant resides to sue in Virginia for authority to remove property or money in Virginia to which the infant is entitled to the jurisdiction of the infant's domicile. The statute, of course, does not apply here because the purpose of this suit is not to remove property or money to which Dotson is entitled from Virginia to another jurisdiction. But we think that the enactment of the statute was clear recognition on the part of the Virginia legislature that the majority common-law rule prevailed in Virginia and that it was necessary to modify it to some extent. Since the modification is inapplicable here, our conclusion is that the majority common-law rule prevails and Bloch is not permitted to sue on behalf of Dotson in Virginia because he was not appointed as guardian of Dotson by a Virginia court of competent jurisdiction. The entire complaint on behalf of Dotson against the defendants who challenged Bloch's legal capacity to sue on Dotson's behalf was properly dismissed for the reasons we have expressed.

VIII.

We summarize our conclusions. We affirm the district court's dismissal of: (1) the prayer for a writ of mandamus, (2) the request for relief under the Freedom of Information Act, (3) the application for a writ of

habeas corpus, (4) the challenge to the decision by Ohio welfare officials to place Ohio orphans in The Mountain Mission School, (5) the challenge to the constitutionality of the Virginia statute exempting The Mountain Mission School from regulation, (6) all claims against defendants William Webster and Griffin Bell, (7) all claims against all Ohio and Florida defendants other than Makely and Sawyer, and (8) all of Dotson's claims against The Mountain Mission School, its sixteen defendant officers, directors and employees, Williams and Osborne. In all other respects, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.⁵

**AFFIRMED IN PART;
VACATED IN PART
AND REMANDED.**

5. In addition to a lack of personal jurisdiction and Dotson's failure to sign any of the pleadings, other defenses to this suit were raised below but not addressed by the district court. On remand, the remaining defendants are of course free to press any such defenses which they raised in a timely fashion.

Va. Code Section 63.1-218. Chapter not to apply to certain schools and institutions. — None of the provisions of this chapter shall apply to any private school or charitable institution incorporated under the laws of this State, which is located west of Sandy Ridge and on the watersheds of Big Sandy river, and to which no contributions are made by the State or any agency thereof. (Code 1950, Section 63-255; 1968, c.578.)

Section 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any

grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen

of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. Section 1980.

Fed. R. Civ. P. 4. Process

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(e) **SAME: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE.** Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) **TERRITORIAL LIMITS OF EFFECTIVE SERVICE.** All process other than a subpoena may be served anywhere within the territorial limits of the state

in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counter-claim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.